NO. 98808-1

SUPREME COURT OF THE STATE OF WASHINGTON

JEREMY L. MATSON,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case presents the narrow issue of whether Jeremy Matson failed to timely protest his workers' compensation wage order under well-settled rules. It does not affect anyone but Matson, and it does not raise a matter of substantial public interest.

The Court of Appeals correctly applied the rule about what constitutes a protest. Matson now claims that two treatment notes from his doctors constituted a protest, but the notes in question were created 13 months after his work injury, do not mention the wage order, and do not even address his wages or employment status at the time of his work injury, which is the relevant time period for setting wages under RCW 51.08.178. Nothing in the treatment notes could have put the Department of Labor and Industries on notice that the wage order was incorrect. Matson's dispute with how the Court of Appeals applied well-settled law to the specific facts of his case is not a matter of substantial public interest under RAP 13.4(b)(4).

The Court of Appeals' decision is also consistent with *Somsak v. Criton Technologies/Heath Tecna, Inc*., 113 Wn. App. 84, 92, 52 P.3d 43 (2002), so there is no basis for review under RAP 13.4(b)(2). Following *Somsak*, the Department's order gave Matson the factual basis for his wage calculation. This Court should deny review.

II. COUNTERSTATEMENT OF THE ISSUES

1. To be construed as a protest, a document must reasonably put the Department on notice that the party submitting the document requests action inconsistent with the Department's decision. Matson's doctors submitted treatment notes in June 2012 that did not mention the Department's wage order or Matson's wages or employment status at the time of his May 2011 work injury. Did the treatment notes protest the wage order?

2. A Department order that has not been protested or appealed is final, even if the order results from legal error. Matson did not protest or appeal the May 2012 wage order. Can he now argue that the order results from legal error?

III. STATEMENT OF THE CASE

A. Matson Timely Protested an Earlier Wage Order But Did Not Protest or Appeal the May 2012 Wage Order Within 60 Days

In May 2011, Matson was injured at work, and the Department allowed his workers' compensation claim. AR 58, 63. The Department issued a wage order in September 2011 setting his total monthly wages at $955.15.[1] AR 59, 63. Department orders become final in 60 days if nobody protests or appeals the order. RCW 51.52.050(1), .060(1).

Matson sent a letter and paystubs to the Department that timely protested the September 2011 wage order. AR 64, 73. His letter stated:

[1] By establishing the worker's wages at the time of injury, a wage order determines the worker's time-loss compensation rate. *See* RCW 51.32.090; RCW 51.32.060.

"the beginning agreement of my employ was 30% commission of all the jobs I complete." AR 73. The paystubs showed that his employer paid him the following amounts as "sales commission[s]":

Period	**Sales commission**
12/18/2010 – 12/31/2010	$135.00
1/1/2011 – 1/14/2011	$286.88
1/15/2011 – 1/28/2011	$690.00
1/29/2011 – 2/11/2011	$90.00
3/12/2011 – 3/25/2011	$1,580.78
3/26/2011 – 4/8/2011	$322.50
4/9/2011 – 4/22/2011	$825.00[2]

AR 74-80.

Matson's protest noted that he worked for his employer from "late December to 5/5/11," that he earned $5,404.65 during his employment with his employer, and that the Department's original determination of "$915.55 per month at $30.52 per day seemed accurate . . . ." AR 73.[3] He

[2] The 4/9/11-4/22/11 paystub also showed that Matson earned $145.00 during the pay period for "straight time" at an hourly rate. AR 80.

[3] The amount of $915.55 could be a typo, as the Department originally set Matson's wage rate at 955.15 in the September 2011 order. AR 59, 63.

also disputed information that a vocational counselor provided: "On the vocational counselor report it states I worked for $8.67 an hour plus commission, employed for 3 months, work[ed] 40 hours per week or full time. None of that is correct." AR 73.

The Department reconsidered the September 2011 wage order and issued a new wage order on May 7, 2012. AR 59, 64. This new order set Matson's gross monthly wages at $776.29. AR 59, 64. The order stated that he earned $776.29 in commissions per month but earned no health care benefits, tips, bonuses, overtime, housing, board, or fuel. AR 82. It also stated that he was single with one dependent. AR 82.[4]

The May 2012 wage order also stated the consequences for failing to appeal within 60 days:

> This order becomes final 60 days from the date it is communicated to you unless you do one of the following: file a written request for reconsideration with the Department or file a written appeal with the Board of Industrial Insurance Appeals. If you file for reconsideration, you should include the reasons you believe this decision is wrong and send it to [the Department] . . . . We will review your request and issue a new order.

[4] A worker receives more benefits if the worker is married or has children. RCW 51.32.060, .090. Payment for health care benefits, tips, bonuses, overtime, housing, board, or fuel is included in a worker's wages for benefit purposes. RCW 51.08.178(1).

AR 82. The Department also sent Matson a letter, asking him to protest within 60 days if he disagreed with any of the order's contents.[5] AR 85. Matson did not protest or appeal the May 2012 order.

B. Matson's Doctors Sent Treatment Notes to the Department in June 2012 That Did Not Mention Matson's Wages or Work Status at the Time of Injury in May 2011

In June 2012, Matson received treatment under his workers' compensation claim from John Long, MD and Terrence Rempel, MD. AR 87-94. Both doctors sent a treatment note for these visits to the Department that summarized their treatment. AR 87-94. Neither note mentioned Matson's wages at the time of the injury in May 2011 or his wages at any other time. AR 87-94. Neither mentioned the Department's May 2012 wage order. AR 87-94.

Each treatment note had information about Matson's work history. AR 87-94. Neither doctor commented on Matson's work status, earnings, or wages at the time of injury in May 2011, which was 13 months before the treatment notes. AR 87-94.

Dr. Long's note stated that Matson "is working full time doing carpet cleaning and running a carpet business and he also I believe, has another job." AR 87. In the "background" section, it also said: "Patient's

[5] Medical providers submit treatment notes to the Department so it can administer the claim and pay for treatment and wage replacement benefits. WAC 296-20-01002 (definition of "chart note"); WAC 296-20-06101; WAC 296-20-125(6)(d).

occupation: Carpet cleaning/catering. Hours worked per week: 40+." AR 88.

Dr. Rempel's note stated, "The patient is self-employed with a carpet cleaning service. Job of injury: Carpet cleaning and window cleaning." AR 93. He noted as a treatment plan: "1. Return to Work: The patient working on a full-time basis without restrictions." AR 94.

In 2013, the Department closed Matson's claim. AR 65. Matson did not protest or appeal the closing order, which also became final and binding. *See* AR 59-60. Matson's claim remained closed for two years before he applied to reopen the claim. AR 59.

C. The Board, Superior Court, and Court of Appeals Agreed That the May 2012 Wage Order Was Final and Binding Because Matson Did Not Protest or Appeal it

In August 2015, the Department reopened Matson's claim at his request. AR 59. After reopening, Matson asked the Department to reconsider the May 2012 wage order. AR 59, 60, 65. The Department denied this request, stating that the unprotested order was final. AR 65.

Matson appealed to the Board of Industrial Insurance Appeals, arguing that Dr. Long's and Dr. Rempel's treatment notes constituted protests to the May 2012 wage order. AR 48, 60. The Board and superior court rejected this argument, concluding that the May 2012 wage order was res judicata because the chart notes were not protests. AR 4, 42; CP

73, 76. The Court of Appeals affirmed. *Matson v. Clean Green Spokane*, No. 36567-1-III, 2020 WL 3432979, at * 1 (Wash. Ct. App. June 30, 2020) (unpublished). The Court of Appeals held that the two treatment notes did not reasonably put the Department on notice that Matson's doctors requested action inconsistent with the May 2012 wage order. Slip op. 3-4. Matson now petitions for review.

IV. ARGUMENT

This is not a case of substantial public interest under RAP 13.4(b)(4). Its resolution is limited to the narrow issue of whether Matson's doctors' notes amounted to a protest of the May 2012 wage order. The Court of Appeals correctly applied the test about what constitutes a protest. Doctors' notes that said nothing about Matson's work status or earnings at the time he was injured in May 2011—which is the relevant time for setting a worker's wages under RCW 51.08.178—did not protest the May 2012 wage order, as the Court of Appeals recognized. Because Matson did not timely protest the order, it is final and he cannot now raise the litany of legal errors that appears in his petition.

Matson also shows no conflict with the *Somsak* case to warrant review under RAP 13.4(b)(2). The Court of Appeals in *Somsak* declined to apply res judicata where a worker failed to appeal earlier payment orders, because those earlier orders did not explain the factual basis for the wage

calculation. But the wage order here gave Matson a clear factual basis for its calculation, including that his wages were based entirely on commissions. So res judicata applies.

A. The Court of Appeals Correctly Applied the Rule About What Constitutes a Protest to Matson's Wage Order

The Court of Appeals correctly applied the law about what constitutes a protest to the facts of this case. Matson's inability to meet this standard here is not an issue of substantial public interest.

Matson's doctors did not protest his wage determination, as the Court of Appeals held. To be a protest, a communication "must reasonably put the Department on notice that the worker is taking issue with some department decision." *Boyd v. City of Olympia*, 1 Wn. App. 2d 17, 30, 403 P.3d 956 (2017), *review denied*, 190 Wn.2d 1004 (2018).[6] This is an objective standard that does not rely on the sender's intentions. *Id.* The court considers "the content of the communication itself and information relevant to it that was in the possession of the department employees or agents involved in handling the claim at the time of the communication."

[6] Matson cites a Board case, *In re Lambert*, No. 91 0107, 1991 WL 11008451 (Wash. Bd. Indus. Ins. Appeals Jan. 29, 1991) to argue that the Court of Appeals should have applied a standard that a worker protests an order when the information is "of such a nature as would have objectively informed an experienced department claims adjudicator that [the order] was potentially incorrect." Pet. 16. Matson faults the Court of Appeals for not applying the "potentially incorrect" standard, but this language does not appear either in *Lambert* or *Boyd*. Pet. 16. The Court of Appeals applied the correct standard from *Boyd*, which is the same standard the Board used in *Lambert*. *Matson*, slip op. 3-4.

Boyd, 1 Wn. App. 2d at 30-31. "The use of any specific words or terminology is not required in a protest . . . ." *Id.* at 31.

As the Court of Appeals recognized, Matson cannot meet this test by relying on Dr. Long's and Dr. Rempel's statements about his work status in their June 2012 treatment notes. Neither note refers to Matson's wages or work status at the time of his injury in May 2011, which is the relevant time period under RCW 51.08.178. Both treatment notes were 13 months after the date of the injury and neither of his doctors' treatment notes put the Department on notice that they disagreed with the wage calculation that referenced events 13 months ago in the wage order.[7] Neither mentions the wage order or suggests that the Department should base Matson's wages at the time of his injury on non-commission income. *See* AR 87-94.

The relevant time period for the wage order is May 2011 because the Legislature requires the Department to set a worker's wages based on earnings at the time of injury. *See* RCW 51.08.178(1). The statute makes this clear: "For the purposes of this title, the monthly wages the worker was receiving from all employment *at the time of injury* shall be the basis

[7] As the Department noted below, Matson's doctors also do not have standing to challenge the wage order because they are not aggrieved parties under RCW 51.52.050(2)(a). *See Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997) (appeal allowed only "[i]f aggrieved" by the Department order).

upon which compensation is computed unless otherwise provided specifically in the statute concerned." RCW 51.08.178(1) (emphasis added). Wages include commissions. *See* WAC 296-14-522.

So under RCW 51.08.178(1)'s plain language, the "monthly wages" that the worker "was receiving from all employment at the time of injury" determines the worker's wages for workers' compensation benefit purposes. For Matson, that would have been the wages he was earning in May 2011.

Matson's arguments ignore that his doctors' comments about his present work status in June 2012 do not address what wages he "was receiving from all employment" in May 2011. Instead, the doctors' notes report on his work status in June 2012, 13 months after the injury. Dr. Long's note from June 2012 states that Matson was "working full time" and may have had another job. AR 87. But this did not tell the Department anything about Matson's work status or wages in May 2011. *See* AR 87. The same is true of Dr. Long's statements that Matson "is working full time doing carpet cleaning and running a carpet business," that he "has another job," and that the background of his occupation was "Carpet cleaning/catering. Hours worked per week: 40+." AR 87-88.

Even assuming all these statements about his work status in June 2012 are true, this did not put the Department on notice about his work

status or wages in May 2011. They were not "conceptually contrary" to the wage order. Pet. 11. Nothing in the notes supports that Matson had full-time, supervisory, and managerial capacity at the time of his injury, as he suggests. *Contra* Pet. 1, 7. Dr. Rempel's notation that Matson's "prior work" included "supervisor" and "manager" does not mean he was performing such work at the time of injury. AR 93. And Dr. Long's notation that Matson had a "background" of working "40+" hours a week does not mean Matson was working this much at the time of injury. AR 88. In fact, Matson's own protest letter suggests otherwise. AR 72. The Court of Appeals was right to decide that the notes were not protests.

The Court of Appeals applied the correct standard from *Boyd* to conclude Matson did not protest. *Matson*, slip op. 4. Matson criticizes language in the opinion that although the June 2012 treatment records "mentioned in passing that Mr. Matson had worked full time," this mention was insufficient to constitute a protest. *Id*. at 4; Pet. 7, 11. He urges this Court to take review to rule that "a 'mention in passing' is plainly enough for a careful adjudicator." Pet. 11.

Matson cherry picks this language and takes it out of context. The court's point was that it was not reasonable to expect the Department to infer that "because Mr. Matson was working full time in June 2012, he was also working full time at the time of injury." *Matson*, slip op. 4. This

makes sense, especially given Matson's own earlier statements to the Department rejecting the assertion that he worked full time at the time of injury. AR 73.

B. Because There Was No Protest to Matson's Wage Order, Res Judicata Applies to Bar Matson's Arguments About Why His Wage Order Is Incorrect

Because Matson did not protest the wage order, that order is final. Under this Court's well-established precedent, Matson cannot now raise legal challenges to a final order. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537-38, 886 P.2d 189 (1994) (failure to appeal an order containing an error of law precludes argument of legal error in the order). Matson's late legal challenges do not constitute matters of substantial public interest under RAP 13.4(b)(4).

Under RCW 51.52.050(1), Matson had 60 days to protest or appeal the May 2012 wage order. He did not, instead waiting to protest until over three years later.[8] Absent a written request to the Department for reconsideration or an appeal to the Board, any such order "*shall* become

[8] Because Matson failed to appeal an order closing his claim that the Department issued after the wage order, there is an alternative basis for ruling that he cannot now challenge the wage order under *In re Randy Jundul*, No. 98 21118, 1999 WL 1446257, *2 (Wash. Bd. Indus. Ins. Appeals Dec. 28, 1999). In that case, there were unanswered protests and the Board ruled that the Department answered them in the unappealed closing order. Here the Department closed Matson's claim, thus ruling on any unanswered protests to the wage order. Matson did not appeal that closing order, further indicating that there was no protest of the incorporated wage determination.

final within sixty days from the date the order is communicated to the parties." RCW 51.52.050(1) (emphasis added).

A final Department order is res judicata as to the contents of the order. *Marley*, 125 Wn.2d at 537-38. Res judicata prohibits relitigating claims that could have been litigated in a prior action. *Id*. This doctrine "applies to a final judgment by the Department as it would to an unappealed order of a trial court." *Id.* at 537. An unappealed Department order is therefore "res judicata as to the issues encompassed within the terms of the order, absent fraud in [its] entry." *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997).

These finality principles apply even if the unappealed order contains a legal error. "The failure to appeal an order, *even one containing a clear error of law*, turns the order into a final adjudication, precluding any reargument of the same claim." *Marley*, 125 Wn.2d at 538 (emphasis added); *see Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 782, 271 P.3d 356 (2012).

Because the wage order is final, Matson can no longer assert that it contains a legal error. *Marley*, 125 Wn.2d at 538. Despite this, Matson devotes much of his petition to assailing what he believes were the Department's legal errors when setting his wages. Thus he asserts that (1) the wage amount was less than half the minimum wage of a full time

worker, which is "unfair and unreasonable" (Pet. 12, 13); (2) a Department adjudicator should know the minimum wage when setting wages (Pet. 12, 13); (3) the Department did not follow statutory mandates in calculating wages (Pet. 1, 13); (4) the Department should set wages using a worker's "wage earning capacity" rather than the wages at the time of injury (Pet. 7); and (5) the wage order did not "communicate the proper legal standard that Mr. Matson's 'wage earning capacity' was at issue." (Pet. 5).

Because he failed to timely protest or appeal the May 2012 order, Matson cannot now, for the first time, raise these alleged legal errors. "The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim." *Marley*, 125 Wn.2d at 538. Matson's late legal challenges to his wage order are not a basis for review.

Even addressing these arguments on the merits shows that they are incorrect. Matson repeatedly asserts that it is unfair, unreasonable, and unconscionable for the Department to set a wage amount that would be under the minimum wage for a full time worker. Pet. 1, 9, 13, 19, 20. For example, he states that $776.29 is "less than half the minimum wage for full time workers like Mr. Matson" and asks this Court to take review to say that any wage order establishing a wage earning capacity "at a rate

less than a minimum wage equivalent is presumptively unfair and unreasonable." Pet. 7, 13.

But Matson did not present evidence he was a full time worker at the time of injury.[9] RCW 51.08.178. To the contrary, his original, timely filed protest of his first wage order stated that he *disagreed* with a statement by a vocational worker that he was a full time worker who worked 40 hours a week. AR 73. Instead, Matson explained that he was paid commission and earned about $5,400 during a several month period from December 2010 to May 2011, and that a determination that he earned $30.52 a day "seemed accurate." AR 73. Matson's own explanation of his wages at the time of injury is not consistent with his current claim that he was working full time. And, as explained above, nothing in the doctors' notes suggested he was a full time worker at the time of injury. The Legislature requires each worker to have their wages set based on what they were earning at the time of injury, so it would make no sense to pay Matson as if he was a full time worker if he was not.

[9] Matson cites AR 87 in his statement of facts to support that he was "working full-time for his employer" when he was injured at work. Pet. 3. And he calls himself a "full time worker[]" at other points in his petition, without citing a specific page in the record. Pet. 7. But AR 87 is Dr. Long's chart note from 13 months later that says that Matson "is working full time." Dr. Long did not say anything Matson's employment status at the time of injury in May 2011.

Matson is also wrong that the wage order "failed the statutory commands of RCW 51.08.178." Pet. 5. He cites RCW 51.08.178(4) to support his claim, but that section applies only if the worker's wages have "not been fixed or cannot be reasonably and fairly determined." RCW 51.08.178(4).[10] Here, the Department could fairly determine his wages based on his paystubs and commissions. The Department calculated his wages in a fair and reasonable manner, contrary to his assertions. Pet. 13.

Matson further argues that the wage order did not "communicate the proper legal standard that Mr. Matson's 'wage earning capacity' was at issue." Pet. 5. But there is no requirement that an order include the legal standard it is applying. And the Legislature intends wages to reflect a worker's earnings at the time of injury, not at some other time. When the Department establishes the "monthly wage that fairly and reasonably reflects [a worker's] lost wages from all employment at the time of injury," this monthly wage "represents the worker's lost earning capacity." WAC 296-14-520.

[10] If this subsection applies, then the worker's monthly wage rate is "computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed." RCW 51.08.178(4).

C. The Court of Appeals' Decision Does Not Conflict With *Somsak* and Review Was Adequate Under *Groff*

The Court of Appeals' decision in this case is consistent with *Somsak*. Matson misreads *Somsak* when he asserts that the cases conflict.

The worker in *Somsak*, unlike Matson, timely appealed her wage order. In *Somsak*, the Department issued a wage order that stated the factual basis for the Department's determination of wages (in that case, it was the worker's hourly rate of pay, hours of work per day, and number of work days per week) for Somsak's time-loss compensation, and the worker timely appealed that wage order. 113 Wn. App. at 89. Despite this timely appeal, the employer argued that the worker could not challenge the wage order when she failed to appeal three previous orders that paid time-loss compensation but did not explain how this compensation rate was calculated. *Id*. at 92. The employer argued that even though the earlier time-loss payment orders did not explain the basis for the time-loss calculation, those payment orders still prevented the worker from arguing that the time-loss calculation was wrong. *See id*. The Court rejected that argument, observing that the wage order was the "first time" the worker received notice of the factual basis for the wage determination, and held that the worker timely protested that order. *Id*. at 89, 93. So the Court declined to apply res judicata. *Id.* at 93.

Here, in plain contrast, the Department's wage order (like the wage order in *Somsak*) provided the factual basis for the determination of Matson's wages, but Matson did not appeal. Specifically, the wage order stated the following facts as a basis for his wage determination:

- Matson's total gross monthly wages at the time of injury were $776.29;
- Matson received no health care benefits, tips, bonuses, overtime, housing, board, or fuel;
- Matson received $776.29 in commissions per month;
- Matson was single; and
- Matson had one child.

AR 82. So res judicata applies to Matson's wage order under the reasoning in *Somsak* because the order apprised him of the factual basis for the Department's decision. There is no conflict.

Ignoring the information that the Department's wage order provided to explain its calculation, Matson argues that the wage order does not "clearly advise" him of the basis for its calculation, so it is vague and res judicata cannot apply. Pet. 19.

But Matson's argument fails because the Department's wage order unambiguously advised him that the Department calculated his total monthly wages at $776.29 based on commissions of $776.29 per month. AR 82. This made it plain that the Department did not believe Matson was receiving any wages other than commissions at the time of his injury. Therefore, the order provided that he was not receiving hourly wages, a

salary, or any other sort of income that would properly be included in his wages. If Matson thought that this was wrong—if he believed that he *was* receiving other types of wages that should be included in his wage order, or if he believed that the commissions were higher than what the Department's order said they were—it was incumbent on him to protest or appeal the wage order. AR 82. He did not do so.

Because the Department determined that Matson's wages came solely from commissions, it also follows that the order would not specify what Matson calls the "mandatory statutory terms" in RCW 51.08.178(1), which include an hourly wage, the numbers of hours worked, a daily wage, or the number of days worked. Pet. 19. None of those considerations applies to a worker who is earning commissions instead of an hourly wage. Matson's argument that the order was vague because it did not include information that is irrelevant to him as a worker receiving commissions makes no sense. Pet. 19.

Contrary to Matson's assertions, the Court of Appeals also complied with the standard in *Groff v. Department of Labor and Industries*, 65 Wn.2d 35, 40, 395 P.2d 633 (1964). Pet. 9. *Groff* requires that, for adequate appellate review, the Court of Appeals should have trial court findings to review that "show an understanding of the conflicting contentions and evidence," as well as "a resolution of the material issues

of fact that penetrates beneath the generality of ultimate conclusions, together with a knowledge of the standards applicable to the determination of those facts." *Groff*, 65 Wn.2d at 40. The Court of Appeals had detailed findings and reasoning to review (CP 71-76) and, like the trial court, the Court of Appeals applied the rule about what constitutes a protest in detail. By explaining why the rule did not support Matson's arguments, it conducted an adequate appellate review. *Contra* Pet. 9. The Court addressed his arguments and applied the relevant standard about what constitutes a protest to the facts of his case.

Finally, it is not fundamentally unfair to apply the rule about what constitutes a protest to Matson. *Contra* Pet. 9. That rule applies to all workers and aggrieved parties.

V. CONCLUSION

The Court of Appeals correctly determined that Matson did not protest a wage order. Its correct application of the law to facts in a case that only affects Matson is not a matter of substantial public interest.

RESPECTFULLY SUBMITTED this 18th day of September, 2020.

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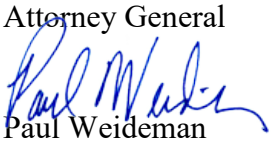

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SUPREME COURT
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JEREMY L. MATSON, Appellant, v. CLEAN GREEN SPOKANE and WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondents.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served Department's Answer to Petition for Review and this Certificate of Service in the below described manner:

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